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No. _____

In The

Supreme Court of the United States

October Term, 1995

ALASKA FEDERATION OF NATIVES,

Cross-Petitioner,

v.

UNITED STATES OF AMERICA, BRUCE BABBITT, SECRETARY OF THE INTERIOR, DANIEL R. GLICKMAN, SECRETARY OF AGRICULTURE, FRANK RUE, COMMISSIONER, ALASKA DEPARTMENT OF FISH AND GAME, and STATE OF ALASKA.

On Cross-Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States' navigational servitude constitutes an interest in waters, title to which is in the United States, within the definition of "public lands" in the Alaska National Interest Lands Conservation Act ("ANILCA"), 16 U.S.C. §§ 3102(1)-(3), so that all navigable waters in Alaska are impressed with the priority for subsistence fishing mandated by §§ 803-805 of ANILCA, 16 U.S.C. §§ 3113-3115?

LIST OF PARTIES

In addition to the parties listed in the caption on the cover page, private respondents Katie John, Doris Charles and the Mentasta Village Council were parties to the proceedings below.

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CROSS-PETITION FOR WRIT OF CERTIORARI

The Alaska Federation of Natives respectfully cross-petitions for a writ of certiorari to review the judgment below of the United States Court of Appeals for the Ninth Circuit. Cross-petitioner requests that this petition be granted irrespective of the Court's disposition of the petition filed by the State of Alaska, No. 95-1084.[1]

OPINIONS BELOW

The Ninth Circuit's opinion (Pet. App. 1) is reported at 72 F.3d 698 (Dec. 19, 1995), *superseding* 54 F.3d 549 (April 20, 1995). The district court's opinion is unreported, Nos. A90-0484 & A92-0264-CV (HRH), 1994 WL 487830 (D. Alaska, March 30, 1994), and is reproduced in the Supplemental Appendix ("Pet. Supp. App.") filed by petitioner in No. 95-1084.

[1] The Indians, Eskimos and Aleuts of Alaska originally established the Alaska Federation of Natives (AFN) as the lead statewide Native organization to advocate for settlement of Native land claims based on aboriginal use and occupancy. Since its formation in 1966, AFN has continued to advocate for Alaska Native hunting and fishing rights, and in this capacity was permitted to intervene as a defendant and to file a cross-claim against the federal defendants in *State of Alaska v. Babbitt*, No. A92-0264-CV (HRH) (D. Alaska), which was consolidated in the district court and on appeal with *Katie John v. United States*, No. A90-0484-CV (HRH).

JURISDICTION

The district court's decision was entered March 30, 1994. Pet. Supp. App. 1-50. The opinion and judgment of the Court of Appeals for the Ninth Circuit was filed on December 19, 1995. 72 F.3d 698 (Dec. 19, 1995) (Pet. App. 1), *superseding* 54 F.3d 549 (April 20, 1995). The State of Alaska's petition for a writ of certiorari (No. 95-1084) was filed on January 2, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are set forth in the State of Alaska's petition for a writ of certiorari. Pet. 1-3.

STATEMENT OF THE CASE

This case concerns whether the geographic scope of the federally protected subsistence hunting and fishing rights secured by Title VIII of the Alaska National Interest Lands Conservation Act, 16 U.S.C. §§ 3111-3126 ("ANILCA"), encompasses all navigable waters in Alaska (as the district court held) or only federal reserved waters (as the Ninth Circuit held). The geographic scope of Title VIII's subsistence priority turns on the proper construction of the term "public lands," 16 U.S.C. § 3102(3), and the words "lands, waters, and interests therein," § 3102(1), "title to which is in the United States." § 3102(2).

The private plaintiffs and cross-petitioner AFN commenced this litigation to establish that (1) "public lands" under ANILCA include the federal government's reserved water rights appurtenant to federal reservations in Alaska (as confirmed below by the Ninth Circuit, 72 F. 3d at 703-704 (Pet. App. 11-12)), and (2) the navigational servitude of the United States renders all navigable waters in Alaska "public lands" (as held by the district court, Pet. Supp. App. 34-43). This cross-petition seeks review of the Ninth Circuit's reversal of the district court's determination that the United States' navigational servitude is an "interest" in "lands" or "waters" "title to which is in the United States" within the meaning of ANILCA, and that Title VIII's subsistence priority to hunt and fish on public lands in Alaska therefore extends to such navigable waters.

The statutory framework and background, the events giving rise to this litigation, and the proceedings below, are set forth in the Private Respondents' Brief in Opposition, No. 95-1084 (March 6, 1996).

REASONS FOR GRANTING THE CROSS-PETITION

I. Whether the Federal Government's Navigational Servitude is a Sufficient "Interest" in Waters for Purposes of ANILCA's Subsistence Fishing Provisions is an Issue of Critical Importance to the Survival of Alaska Native Villages

The court of appeals rather summarily rejected the district court's well-reasoned conclusion (Pet. Supp. App.

34-43) that the navigational servitude is a sufficient interest of the United States in the navigable waters of Alaska to bring those waters within ANILCA's definition of "public lands." Instead, the Ninth Circuit, while agreeing that federal reserved waters appurtenant to federal reservations in Alaska are covered by ANILCA, adopted a narrow construction of the "public lands" definition in ANILCA, and held that the navigational servitude does not constitute "public lands" on the apparent grounds that the United States does not hold "title" to the navigational servitude and/or that it is not an "interest" in navigable waters. 72 F.3d at 702, Pet. App. 9. In so holding, the court denied any meaningful protection for Alaska Native subsistence fishing in many areas of rural Alaska.

The proper construction of "public lands" is of critical import to Alaska Native villages, for any decision limiting the geographic scope of their subsistence priority threatens their survival and traditional way of life. Indeed, the decision below forecloses any protection at all for Native village subsistence fishing activities in all of Alaska's coastal waters, and in many inland rivers and streams that are not reserved as part of the various federal reservations Congress has set aside. This grave threat is hardly theoretical, for most Native villages in Alaska are extremely remote and are located on navigable rivers or along the coasts of the North Pacific and Arctic Oceans. Their proximity to water is no accident and

reflects the direct dependence of villagers on ready access to fish stocks for their daily sustenance.[2]

The importance of subsistence to Alaska Natives was not lost on Congress when it enacted ANILCA. After holding extensive hearings throughout rural Alaska, the House Committee on Interior and Insular Affairs recognized that "[t]here are more than two hundred rural communities throughout Alaska. In many, fresh meat, *fish* and produce are unavailable except through the subsistence harvest." H. REP. NO. 1045, 95th Cong., 2d Sess., Part I, 182 (1978) (emphasis added). Congress accordingly declared that "the continuation of the opportunity for subsistence uses by rural residents of Alaska . . . is *essential* to Native physical, economic, traditional, and cultural existence. . . . " 16 U.S.C. § 3111(1) (emphasis added). That Congress was intent on protecting subsistence fishing is obvious in Title VIII, which mentions fish or fishing no fewer than twenty times. *See also, e.g.*, 126 CONG. REC. 29280 (1980) (Rep. Udall).

Throughout Title VIII's development Congress made note of the dependence of rural Native villages on subsistence fishing, at times even naming many of the villages,[3] very few of which are located within or near federal refuges, parks, national forests, and the like (which have reserved waters). It simply makes no sense that Congress

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[2] "About 65% of the State's subsistence harvest by weight is fish." Robert Wolfe, *Myths: What Have You Heard?*, Alaska Dept. of Fish and Game 21 (Nov.-Dec. 1989).

[3] *See, e.g.*, S. REP. NO. 413, 96th Cong., 1st Sess. 233 (1979), *reprinted in* 1989 U.S. CODE CONG. & ADMIN. NEWS 5070, 5177.

would have specifically intended to protect Native subsistence fishing rights and yet restrict the subsistence preference to those relatively few inland waters that flow through national parks and refuges. Since the Ninth Circuit concluded that the plain language of the statute is not dispositive (72 F.3d at 702 (Pet. App. 8-9)), it should have adhered to this Court's longstanding admonition that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *South Dakota v. Bourland*, 508 U.S. 679, ___, 113 S. Ct. 2309, 2316 (1993) (quoting *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985)).[4]

Unless this Court reverses the decision below, most Native subsistence users dependent upon fish as the mainstay of their livelihood will be denied the protections enacted by Congress that are essential to their traditional way of life. As the Ninth Circuit has put it, "[i]f

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[4] The provisions of Title VIII and the "public lands" definition must be considered in light of " 'the provisions of the whole law, and its object and policy.' " *United States Nat'l Bank of Oregon v. Independent Ins. Agents of America*, 508 U.S. 439, 450 (1993). "The subsistence-protection provisions [of ANILCA]," in particular, "must be viewed in the context of the Act as a whole." *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 549 (1987). The court below failed to do so, and thus failed to consider "the mischief at which [the statute] was aimed and the object it was supposed to achieve." 2A SUTHERLAND STATUTORY CONSTRUCTION, § 48.03 (C. Sands 5th ed. 1992).

their right to fish is destroyed, so too is their traditional way of life."[5]

II. The Ninth Circuit's Construction of ANILCA's "Public Lands" Definition Conflicts With this Court's Holding in *Amoco v. Village of Gambell*

In *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531 (1987) (involving the nature of the federal government's interests in the outer continental shelf), this Court construed ANILCA's "public lands" provision to include both technical full fee title and lesser "interests," as expressly provided for in the statute. *Id.* at 548. The Court "reject[ed] the assertion that the phrase 'public lands,' in and of itself, has a precise meaning, without reference to a definitional section or its context in a statute." *Id.* at 548

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[5] *Native Village of Quinhagak v. United States*, 35 F.3d 388, 394 (9th Cir. 1994), *quoting United States v. Alexander*, 938 F.2d 942, 945 (9th Cir. 1991). As noted in another context:

> The maintenance of this subsistence economy is requisite to the literal survival of these isolated Alaskan tribal villages. . . . [E]ven if the community's physical survival is not placed in immediate jeopardy by disruptions from oil and gas exploration, the very social structure of the village is jeopardized. A reduced availability of naturally recurring resources . . . alter[s] the depth, breadth and strength of the clans, the organizational core of society." Subsistence is nothing less than "a symbolic and organizational base for their spiritual life."

People of the Village of Gambell v. Hodel, 774 F.2d 1414, 1425 (9th Cir. 1985), *rev'd sub nom. on other grounds, Amoco Production Co. v. Village of Gambell*, 480 U.S. 531 (1987).

n.15. Rejecting the notion that ANILCA's "title" to "interests" refers only to full fee title, or some technical record or deed title, this Court adhered to ANILCA's plain meaning, concluding that the United States holds sufficient "title" to "interests" in the Outer Continental Shelf to satisfy ANILCA's "public lands" definition:

> The United States may not hold "title" to the submerged lands of the OCS, but we hesitate to conclude that the United States does not have "title" to any "interests therein." Certainly, it is not clear that Congress intended to exclude the OCS by defining public lands as "lands, waters, and interests therein" "the title to which is in the United States."

Id.[6] Thus, in conformity with the statute's plain language, the Court concluded that the United States need not hold fee simple title to lands or waters. Rather, it need only own some "interests" in the lands or waters to bring them within the definition of "public lands" and thus the subsistence protections of Title VIII.

In interpreting ANILCA's definition of "public lands" narrowly so as to exclude all but federally reserved navigable waters from Title VIII's geographic scope, 72 F.3d at 702 (Pet. App. 9), the Ninth Circuit failed to adhere to this Court's caution that the meaning of "geographic terms" that do not have "precise geographic/political meanings" must "be derived from their context in the statutes." *Gambell*, 480 U.S. at 547 n.14. As

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[6] The Court went on to hold that despite that ruling, the OCS is not situated "in Alaska" and for that reason is not covered by ANILCA Title VIII's protections.

the Ninth Circuit had previously recognized without disapproval by this Court, the statutory context of the protections afforded by Title VIII's provisions is that they were meant " 'to be co-extensive with the extinguishment of aboriginal rights that made those measures necessary.' " *Id.* at 537, *quoting People of the Village of Gambell v. Clark*, 746 F.2d 572, 579-80 (9th Cir. 1984).

From statehood to the present Congress has endeavored to protect the hunting and fishing activities of Alaska Natives. In the wake of this Court's decision in *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955), section 4 of the Alaska Statehood Act preserved for future action by Congress all Native aboriginal rights to hunt and fish throughout the State. Act of July 7, 1958, 72 Stat. 339, as amended, 73 Stat. 141. Plainly those aboriginal uses included subsistence fishing in the navigable rivers and coastal waters of ancestral Native villages. When state land selections under the Act nonetheless threatened those rights, the Secretary of the Interior imposed a land freeze pending further congressional action. *Public Land Order* 4582, 34 Fed. Reg. 1025 (1969); *see Alaska v. Udall*, 420 F.2d 938 (9th Cir. 1960), *cert. denied.*, 308 U.S. 1076 (1970). When Congress in the 1971 Alaska Native Claims Settlement Act[7] next extinguished all Native aboriginal hunting and fishing rights "in Alaska," *Gambell*, 480 U.S. at 530 (including in all navigable waters), it instructed the Secretary and the State "to take any action necessary to protect the subsistence needs of

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[7] 43 U.S.C. §§ 1601, 1603(b).

the Natives."[8] And, when both failed to act, Congress responded with Title VIII of ANILCA, in order to protect the same fishing and hunting rights that had previously been extinguished in the Settlement Act. Thus, the very same Native aboriginal hunting and fishing rights protected under the Statehood Act, and extinguished under the Settlement Act on the expectation the Secretary and the State would take protective action, now find protection in Title VIII. That is the "context," 480 U.S. at 548, from which the meaning of the geographic term "public lands" must be derived.

In its perfunctory rejection of the district court's holding and cross-petitioner's argument that the navigational servitude is an interest in navigable waters, title to which is in the United States, 72 F.3d at 702-03 (Pet. App. 9-10), the Ninth Circuit disregarded the statutory context of the term "public lands," and ascribed no meaning at all to the term "interests" in "waters." This is contrary to the approach taken by this Court in *Gambell*. Indeed, as explained next, the navigational servitude is an interest of the United States in navigable waters that is at least equal in stature to the Nation's interests in the submerged lands of the Outer Continental Shelf at issue in *Gambell*. And the United States surely has "title" to the interests in navigable waters flowing from the navigational servitude in the most fundamental and decisive sense – the absolute power of disposition and control. The Ninth Circuit's decision is thus in conflict with this Court's *Gambell* opinion with respect to an issue of compelling importance to

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[8] CONF. REP. NO. 92-746, 92d Cong., 1st Sess. 37, *reprinted in* 1971 U.S. CODE CONG. & ADMIN. NEWS 2247, 2250.

the continuation of the Alaska Native subsistence way of life, a way of life that Congress explicitly declared to be in the national interest and sought to promote.

III. The Decision Below Misconstrues the Nature of the United States' "Interests" in Navigable Waters by Virtue of the Navigational Servitude

A. The Navigational Servitude is an Interest in Waters Owned by the United States

The navigational servitude is an easement and therefore an interest in real property.[9] *United States v. Grand River Dam Auth.*, 363 U.S. 229, 231-32 (1960) ("the United States has a superior navigation easement which precludes private ownership of the water or its flow. . . . "); *United States v. Twin City Power Co.*, 350 U.S. 222, 224 (1956) (Congress may appropriate the flow of a river to the exclusion of any conflicting or competing interest); *Montana v. United States*, 450 U.S. 544, 555 (1981) (the navigational servitude is an easement reserved for the benefit of the public); *United States v. Cherokee Nation of Oklahoma*, 480 U.S. 700, 706 (1987) (referring to the servitude as a " '*navigational easement*,' " *quoting Choctaw Nation v. Oklahoma*, 397 U.S. 620, 635 (1970) (emphasis in original)).

Navigable waters are the "*public property* of the nation." *Gilman v. Philadelphia*, 70 U.S. (3 Wall.) 713, 724-725 (1865) (emphasis added); see also, *United States v.*

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[9] "The term 'servitude' used in the civil law is roughly equivalent to 'easement' in the common law. . . . " 2 G. Thompson, REAL PROPERTY 8 (J. Grimes repl. 1961).

Rands, 389 U.S. 121, 123 (1967); *Wyandotte Transp. Co. v. United States*, 389 U.S. 191, 201 (1967). The navigational servitude is derived from the public's right to use navigable waterways for navigation and commerce, and is a property interest that correspondingly reduces the property interests of riparian owners:

> Whatever the nature of the interest of a riparian owner in the submerged lands in front of his upland bordering on a *public navigable water*, his title is not as full and complete as his title to fast land which has no direct connection with the navigation of such water. *It is a qualified title, a bare technical title*, not at his absolute disposal, as is his upland, to be held at all times subordinate to such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by the *public right of navigation*.

Scranton v. Wheeler, 179 U.S. 141, 163 (1900) (emphasis added); see also *Gibson v. United States*, 166 U.S. 269, 271-72 (1897); *Lewis Blue Point Oyster Cultivation Co. v. Briggs*, 229 U.S. 82 (1913); *Kaiser Aetna v. United States*, 444 U.S. 164, 186 (1979) ("The National Government is guardian of a public right of access to navigable waters of the United States").

The court below misconstrued the nature and source of the federal government's "interests" in waters, ruling that the United States could not own title to waters or interests therein because the servitude is derived from

the Commerce Clause[10] and is thus a "concept of power, not of property." 72 F.3d at 702 (Pet. App. 9) (quoting *United States v. Certain Parcels of Land*, 666 F.2d 1236, 1238 (9th Cir. 1982), citing *United States v. Twin City Power Co.*, 350 U.S. 222, 224-25 (1956)). Even assuming the power/property dichotomy has some significance, the appellate court failed to recognize that the servitude is an interest in waters by virtue of its proprietary nature as public property, held in trust by the national government for the benefit of the Nation and its economy.[11] *The Daniel Ball*,

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[10] U.S. CONST. art I, § 8 cl. 3: "The Congress shall have the power: . . . To regulate commerce with foreign nations, and among the several states, and with the Indian tribes. . . ."

[11] The Ninth Circuit has not been consistent in its treatment of the servitude. In *Boone v. United States*, 944 F.2d 1489, 1494 n.9 (9th Cir. 1991), the court acknowledged that "the label, 'servitude' implies a property interest." Yet in *City of Angoon v. Hodel*, 803 F.2d 1016, 1028 n.6 (9th Cir. 1986), *cert. denied*. 484 U.S. 870 (1987), the Ninth Circuit stated that the United States does not hold title to the navigational servitude, *citing United States v. Virginia Elec. & Power Co.*, 365 U.S. 624, 627-28 (1961) (servitude is "power of government to control and regulate navigable waters in the interest of commerce") (quoting *United States v. Commodore Park*, 324 U.S. 386, 390 (1945)). Beyond offering the quoted language, the court of appeals did not further discuss either case. But neither decision holds that the navigational servitude is not an interest in water, and *Virginia Electric* specifically refers to the servitude as an "easement." While neither decision explicitly holds that the United States has title, each analyzes the navigational servitude as both a geographically-defined property interest, dominant over all other interests, and as a vehicle for regulation under the Commerce Clause. *Virginia Elec.*, 365 U.S. at 627 (the court referred to the "navigational servitude – sometimes referred to as a 'dominant servitude,' . . . or a 'superior navigation easement . . . ' "); *Commodore Park*, 324 U.S. at 391

77 U.S. (10 Wall.) 557 (1870); *The Eagle*, 75 U.S. (8 Wall.) 15 (1868); *The Hine*, 71 U.S. (4 Wall.) 555 (1866).

B. The Servitude's Character as Property is Confirmed by the Absence of any Duty to Pay Just Compensation to Riparian Land Owners

The power to regulate navigation confers upon the United States a "dominant servitude," *Federal Power Comm'n v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 249 (1954), or a "superior navigation easement." *United States v. Grand River Dam Auth.*, 363 U.S. 229, 231 (1960). The navigational servitude is "dominant" because it includes the right to displace vested property rights without benefit of Fifth Amendment compensation. The riparian owner has property rights in the stream which are protected against third parties, but such rights are burdened by the federal government's servitude. As a consequence, the exercise of the government's right does not constitute a taking. *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53 (1913); *United States v. Twin City Power Co.*, 350 U.S. 222 (1955). Whatever interests riparians may have or claim in the bed or banks of a stream below ordinary high water mark are thus non-compensable. *United States v. Willow River Power Co.*, 324 U.S. 499 (1945).

("[r]espondent's property was always subject to a dominant servitude . . . ," and his "fast lands [were] left uninvaded, [he] ha[d] no private riparian rights . . . , for which rights the government must pay.").

Since the navigational servitude is owned by the United States, the government need not pay compensation for the simple reason that the government can not be compelled to pay for what it already owns. Indeed, the federal government's interest in the navigational servitude is so broad that it has been invoked to destroy bridges, piers, tunnels, rights of access and riparian land values, all without compensating private owners.[12] As commentators have noted,

> [t]he incidents of the federal interest [in navigable waters] have been developed to the point where its proprietary character is quite clear and . . . continued attempts to deal with it solely under the commerce clause are both unnecessary and misleading. The interest should be recognized for what it is and be dealt with in the context of the property clause of the Constitution."

Bartke, *The Navigation Servitude and Just Compensation – Struggle for a Doctrine*, 48 OR. L. REV. 1, 2 (1968); see also, Munro, *The Navigation Servitude and the Severance Doctrine*, 6 LAND AND WATER L. REV. 491, 503 (1971) (the navigational servitude is "in effect ownership of the entire stream flow"). The district court correctly concluded below that "the character of the navigational servitude establishes . . . that the servitude is not always

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[12] *United States v. Twin City Power Co.*, 350 U.S. 222 (1956) (value of riparian land as a hydroelectric site held not compensable); *United States v. Commodore Park*, 324 U.S. 386 (1945) (pier); *Union Bridge Co. v. United States*, 204 U.S. 364 (1907) (bridge); *West Chicago Street R.R. v. Chicago*, 201 U.S. 506 (1906) (tunnel under river).

accurately described as just a power. For purposes of ANILCA Title VIII, the navigational servitude is more properly characterized as an interest in waters." Pet. Supp. App. 39. The Ninth Circuit erred in rejecting this proposition.

CONCLUSION

For the foregoing reasons the Alaska Federation of Natives' cross-petition for a writ of certiorari should be granted.

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No. 95-1496

In The

Supreme Court of the United States

October Term, 1995

ALASKA FEDERATION OF NATIVES,

Cross-Petitioner,

v.

UNITED STATES OF AMERICA, et al.,

Cross-Respondents.

On Cross-Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether in defining "public lands" in the Alaska National Interest Lands Conservation Act Congress understood the navigational servitude to be property to which the United States holds title, thereby demonstrating a clear intent to include all navigable waters in Alaska in that definition and to assume traditional state management of fisheries in all navigable waters in Alaska, a contention rejected by both the Court of Appeals for the Ninth Circuit and the Alaska Supreme Court?

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REASONS FOR DENYING THE WRIT

I. AFN ITSELF HAS CHARACTERIZED THE DECISION BELOW AS A SINGULAR ISSUE OF STATUTORY INTERPRETATION APPLICABLE ONLY TO ALASKA.

Cross-Petitioner the Alaska Federation of Natives ("AFN") urges the Court to grant its petition for certiorari because the definition of "public lands" is an issue of "critical importance" to the survival of Alaska Native Villages. Cross-Pet. 3. On the same point in a different brief, AFN argued that the Court should deny the State's petition for certiorari because the definition of "public lands" is an issue merely of statutory interpretation "involving one section of [ANILCA], a statute unique to Alaska with no application to any other state." Private Respondents' Br. in Opp. 1. It stated also that the Ninth Circuit's decision presents no issue warranting review even with respect to its impact within Alaska. *Id.* at 14-5.

Obviously, AFN cannot credibly argue that the issue is both crucial and unworthy of review. If the Ninth Circuit decision involves a simple issue of statutory interpretation of little significance, it cannot also be "of critical importance." There is an essential distinction between the issues the two petitions present that warrants acceptance of the State's petition and denial of AFN's petition, however. The Alaska Supreme Court decision in *Totemoff v. State*, 905 P.2d 954 (1995), creates a conflict with the Ninth Circuit as to the issue of waters subject to a federal reserved water right, the issue of which the State seeks review. *Totemoff* agrees with the Ninth Circuit's conclusion that the United States does not hold title to the

navigational servitude, however, the issue of which AFN seeks review. Denial of AFN's cross-petition will simply maintain the status quo, while denial of the State's petition will instate a jurisdictional conflict between the federal and state courts in Alaska that will harm fisheries and confuse the public.[1] *See* State's Pet. 8-13.

II. CONGRESS GAVE NO CLEAR INDICATION THAT IT INTENDED TO USURP TRADITIONAL STATE MANAGEMENT AUTHORITY IN ALL NAVIGABLE WATERS IN ALASKA.

AFN argues that fishing is an important element of a subsistence lifestyle of rural Alaskans, so the Court should infer that Congress meant to include all navigable waters in Alaska in defining "public lands" in ANILCA. Cross-Pet. 3-7. The Court cannot grant a subsistence priority where Congress failed to clearly state that intent, however, because of the grave implication of the remedy AFN seeks: if ANILCA's subsistence priority applies to fishing in all navigable waters in Alaska, then the Federal Subsistence Board will usurp state regulation of subsistence and some nonsubsistence fishing in these waters. Congress did not clearly state any such intent; AFN's explanation of how Congress included navigable waters is contrived and enigmatic. The Court should not presume that Congress intended this if the statutory language or legislative history does not make it clear,

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[1] Further, 11 western states disagree with the proposition that the Ninth Circuit's decision has no implications outside Alaska. *See* Briefs of Amici Curiae in support of State's Petition for Writ of Certiorari.

because fisheries management is a traditional state police power that should not be pre-empted without Congressional consideration of its effect on the delicate federal/state balance of functions.

The Supreme Court will interpret a law to affect all activities within Congress' control under its commerce power only if the statutory language or legislative history constitutes a clear statement that Congress intended to exercise this power in full. Laurence H. Tribe, *American Constitutional Law*, § 5-8 at 316 (2d ed. 1988). Federal statutes impinging upon important state interests "cannot . . . be construed without regard to the implications of our dual system of government. . . . " Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 540 (1947) (quoted in part in *BFP v. Resolution Trust Corporation*, ___ U.S. ___, 114 S. Ct. 1757, 1764-65 (1994)). The Court will presume that Congress did not intend to pre-empt areas of traditional state regulation. *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 740 (1985). Where the field which Congress is said to have pre-empted includes areas that have "been traditionally occupied by the States," Congressional intent to supersede state laws must be "clear and manifest." *English v. General Electric Co.*, 496 U.S. 72, 79 (1990); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

Management of fisheries is an area of traditional state authority. Absent federal legislation on the subject, a state has exclusive power to protect and manage fish and wildlife within its borders. *Carey v. South Dakota*, 250 U.S. 118, 120 (1919). Fisheries management is of the utmost importance to the State of Alaska, as fishing is the State's second largest industry, and securing management

authority was a primary reason Alaskans sought statehood in the 1950's. *See* State's Pet. 13-14.[2]

Congress did not consider pre-emption of state fisheries in passing ANILCA. It chose a definition of "public lands" that includes federally-owned "lands," with certain exceptions, and chose a definition of "lands" that is boilerplate language found in hundreds of statutes in title 16 of the United States Code.[3] Further, the precise scope of "public lands" was immaterial because Congress knew that in anticipation of the pending ANILCA bills, the State had passed a law granting a subsistence priority applicable to ***all*** lands and waters in Alaska in 1978, two years before Congress passed ANILCA. Act of July 12, 1978, Alaska Laws, Ch. 151, *reprinted in Bobby v. Alaska*, 718 F.Supp. 764, 788-91 (D. Alaska 1989); *see* H.Rep. 96-97, Part II, Committee on Merchant Marine and Fisheries, 96th Cong., 1st Sess. at 193 (1979) (section providing for subsistence preference "nearly identical to existing State law"); S. Rep. No. 1300, Committee on Energy and Natural Resources, 95th Cong., 2d Sess. at 220 (1978) (noting that the State had adopted a subsistence provision nearly

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[2] AFN urges the Court to apply the interpretative maxim that statutes should be construed liberally in favor of Indians. Cross-Pet. 6. This maxim should not be applied so as to eradicate the clear statement requirement for pre-emption of traditional state powers.

[3] ANILCA defines "lands" as "lands, waters, and interests therein," 16 U.S.C. § 3102(1), language that Congress routinely uses in statutes in title 16 establishing conservation areas and parks. *See, e.g.*, 16 U.S.C. §§ 90b, 110c(c)(3), 121, 228b(a), 230a(b), 230g(a), 272(a), 273, 398d, 410j, 410o, 410p, 410bb(b)(1), 410ff-1(a), 410gg, 410gg-1, 410ii-3(a), 410jj-3(c), 410mm-2(b), 410qq-2(a), 410rr-2, 410rr-7(c).

identical to that contemplated by Congress). Congress contemplated that the State would implement the subsistence priority everywhere in Alaska, therefore, and thus necessarily would manage all fisheries.[4] As a result, Congress did not debate the meaning of its definition of "public lands," and did not consider displacing state management of fisheries. AFN does not even suggest that Congress thought that the navigational servitude was a property interest of the United States or that it thought "public lands" included the navigational servitude.[5]

III. THE NAVIGATIONAL SERVITUDE IS THE PARAMOUNT AUTHORITY OF THE UNITED STATES OVER NAVIGATION AND DOES NOT CONSTITUTE A PROPERTY INTEREST.

The argument that all navigable waters in Alaska are "public lands" under ANILCA is premised on the proposition that the navigational servitude is a property interest to which the United States has "title." The navigational servitude is not a property interest but is the

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[4] Congress never foresaw that in 1989 the Alaska Supreme Court would issue the decision that would prompt federal management on "public lands." *See McDowell v. State*, 785 P.2d 1 (Alaska 1989); State's Pet. 4.

[5] The statement that Rep. Udall submitted to the Congressional Record does not reflect the intent of Congress, because both houses passed ANILCA before any member of Congress could have read the statement. *See State v. Babbitt*, 72 F.3d 698, 703 (9th Cir. 1995) (Udall's views deserve little weight, because he inserted the statement after the Senate passed ANILCA, after the House had finished debating it, and shortly before the House voted on it).

authority of the United States to regulate in furtherance of navigation. It refers to the government's dominion over navigable waters, *United States v. Twin City Power Co.*, 350 U.S. 222, 228 (1956), for the purpose of keeping them open for use by the public as "continuous highways for the purpose of navigation in interstate commerce," *Kaiser Aetna v. United States*, 444 U.S. 164, 178 (1979). It derives from the Commerce Clause, which "speaks in terms of power, not of property." *Twin City Power Co.*, 350 U.S. at 224.

AFN argues that the United States holds "title to an interest" in all navigable waters in Alaska because it is not required to compensate riparian property owners when it exercises the navigational servitude. It argues also that the Ninth Circuit's rejection of this argument is inconsistent with a previous decision of this Court, *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531 (1987). The navigational servitude does not give the United States title to an interest in the property of a riparian owner, however, but is merely the exercise of governmental authority to regulate land use, which does not constitute a taking in any context when a property owner takes title with the restriction in place. Further, this Court's previous dictum about the nature of the United States' interest in the outer continental shelf does not support the argument that the United States has title to the navigational servitude.

A. THE AUTHORITY OF THE UNITED STATES TO REGULATE LAND USES DOES NOT GIVE IT TITLE TO AN INTEREST IN THE AFFECTED PROPERTY.

AFN argues that the United States must hold title to the navigational servitude because it is not required to compensate riparian property owners when the government uses or diminishes the value of the property in furtherance of navigation or commerce. Cross-Pet. 14. It also points to language in Supreme Court decisions describing the navigational servitude as a "dominant servitude" or an "easement." *Id.*

A government does not have a property interest in lands or waters simply by virtue of its authority to restrict or prohibit certain uses without compensation. Laws in existence when a property owner obtains land define the owner's interest in the property. Because laws restricting the owner's use of the land limit the rights he gets as owner, he suffers no loss when the government enforces those restrictions. In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1030 (1992), this Court explained that the Takings Clause does not require compensation when an owner is barred from putting land to a use that is proscribed by "existing rules or understandings that stem from an independent source such as state law [that] define the range of interests that qualify for protection as 'property' under the Fifth (and Fourteenth) amendments." Such rules also may stem from federal law. *See id.* at 1029. The Court cited this principle as an exception to the Fifth Amendment compensation requirement for both physical takings and for regulatory takings. *Id.*

Thus, governmental action based on the authority to regulate navigable waters for commerce and navigation do not effect takings of the property interests of a riparian land owner because the owner obtained the property interest subject to this authority.

The fact that a property owner gets less than a "full bundle of sticks" because the government has existing authority to restrict land use does not mean that the government holds title to an interest in the land in any conventional sense of property law. A government's authority to limit land use for the public good is a sovereign rather than a proprietary function. To the extent that existing restrictions limit a property owner's use of land, the government does not have a corresponding property interest that it can sell, transfer, or otherwise convey. Property rights are determined by law, and laws restricting land use simply change the number of sticks that constitute a "full bundle" in holding fee title to the affected property.

For example, an Office of Surface Mining Reclamation and Enforcement's cessation order that prevented mining did not effect a taking, because the company's "bundle of rights" in the property did not include an interest in weakening the surface of the land so as to threaten the public. *M & J Coal Company v. United States*, 47 F.3d 1148, 1154 (Fed. Cir.), *cert. denied*, 116 S.Ct. 53 (1995). Similarly, the owner of a wetland who obtained it after Congress passed the Clean Water Act did not suffer a loss by the Environmental Protection Agency's denial of a permit under § 404(c) of that act. *See Ciampitti v. United*

States, 22 Cl.Ct. 310, 321-22 (1991) (landowner who purchased wetland with knowledge of the regulatory structure and with warning that the requisite permit was "virtually impossible to get" had no reasonable investment-backed expectations). The owner of a savings and loan association did not suffer a taking when the Resolution Trust Corporation seized the property, because the owner "did not possess the most valued property right in the bundle of property rights, the right to . . . exclude others." *California Housing Securities, Inc. v. United States*, 959 F.2d 955, 958 (Fed. Cir.), *cert. denied*, 506 U.S. 916 (1992); *see also 767 Third Avenue Associates v. United States*, 48 F.3d 1575 (Fed. Cir. 1995) (as member of the public, lessor of office space to foreign government was on notice that the United States government could close a foreign government's offices and freeze its assets, and thus had no expectation of no governmental interference). Under AFN's theory, the United States would hold "title to an interest" in all the property subject to regulation in these cases.

Further, the description of the navigational servitude in case law as a "servitude" or an "easement" does not indicate that the United States has title to it. Any preexisting restriction on land use could be analogized to an easement; the Environmental Protection Agency's authority to deny a § 404 permit under the Clean Water Act could be characterized as a conservation easement or a restrictive covenant on wetlands to which the authority attaches, for example. 33 U.S.C. § 1344(c) (1986). These interests simply describe a granted right to limit uses of land. In the context of private persons or entities, they constitute property interests that are proprietary and

transferable, but when legislated or promulgated by the government they constitute the exercise of sovereign regulatory authority.

Congress itself has defined the navigational servitude as regulatory authority rather than a property interest. In the Submerged Lands Act, 43 U.S.C. §§ 1301-1315 (1986), Congress defined the navigational servitude expressly to exclude any ownership rights. In confirming in and granting to states title to certain submerged lands, the United States retained:

> all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of **which shall be paramount to, but shall not be deemed to include, proprietary rights of ownership**. . . .

43 U.S.C. § 1314 (emphasis added).

Equating the regulatory authority of the United States to a property interest in non-federal lands and waters to render them "public lands" is the complete antithesis of finding a clear and manifest statement of Congressional intent to assume management of Alaska's fisheries. AFN vigorously promotes this theory without offering any evidence that Congress thought it was including all lands and waters subject to its authority to restrict uses. Had Congress meant to pre-empt state management of fish and wildlife to this extent, surely it would have found a clearer way to express that intent than by referring to federal "title to interests in lands and waters" and assuming that this would be understood to include all lands and waters subject to its regulatory

authority. It would have defined "public lands" simply as all lands and waters in Alaska.

B. THE NINTH CIRCUIT'S REJECTION OF THE ARGUMENT THAT THE UNITED STATES HOLDS TITLE TO THE NAVIGATIONAL SERVITUDE IS CONSISTENT WITH THIS COURT'S PRECEDENT.

AFN's argument that the Ninth Circuit decision conflicts with *Amoco v. Village of Gambell* greatly overstates the significance of one sentence in a footnote in that case. 480 U.S. at 548 n.15. The sentence was dictum and does not support its interpretation of the definition of "public lands."

Gambell raised the issue of whether the outer continental shelf ("OCS") constitutes "public lands" under ANILCA § 102. This Court found that the OCS does not qualify as "public lands" under ANILCA because it is outside the boundary of Alaska. *Id.* at 547. In dictum, the Court stated also that while the United States may not hold title to the submerged lands of the OCS, it hesitated to conclude that the United States did not hold title to any interests therein. *Id.* at 548 n.15.

To conclude from this dictum that the Court believes that Congress intended the existence of any federal interest in any lands or waters to convert them to "public lands" is an extraordinarily broad reading of the footnote. The Court's hesitation to conclude that the United States does not hold any interest in lands over which it has "paramount rights," *United States v. California*, 332 U.S. 19, 36 (1947), does not imply that any federal interest in

lands or waters would convert them to "public lands" if they were in Alaska. Furthermore, even if the Court had found that Congress intended the OCS to be "public lands" under ANILCA, the United States' interest in the OCS is quite different than its interest in all navigable waters. While the United States does not hold title to the OCS in the conventional sense, it has paramount national power over it, and has a property interest in the oil and gas there, which it leases to private entities. *United States v. Maine*, 420 U.S. 515, 524-25, 527-28 (1975). Congress has declared the OCS to be an area appurtenant to the United States, subject to its jurisdiction, control, and power of disposition. Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-1356, 1332(1) (1986).

It was unextraordinary, therefore, that the Court hesitated to find that the United States did not hold title to any interest in the OCS. This statement cannot be understood to mean that the existence of the navigational servitude converts all navigable waters in Alaska to "public lands." In making this statement in *Gambell*, the Court did not examine the clear statement doctrine to determine whether Congress clearly intended to assume a traditional state function; it did not consider whether the authority to regulate land gives the United States "title" to an interest in property; and it did not consider whether the navigational servitude constitutes property of the United States. The Court's statement should be understood in relation to the issue before it.

AFN also overstates the meaning of the Court's statement that "public lands" must be understood in context. Cross-Pet. 8-10. This Court never has suggested that in interpreting "public lands," a court should consider the

universe of factors suggested by AFN. As "context" for Congress' intent in drafting a definitional provision that it hardly discussed, AFN suggests that the Court consider a 1955 Supreme Court decision, the Alaska Statehood Act, the Alaska Native Claims Settlement Act, and the Secretary of Interior's land freeze in 1969. Cross-Pet. 9-10. In fact, the Court simply stated in *Amoco* that it rejected the assertion that the phrase "public lands," in and of itself, has a precise meaning *"without reference to a definitional section or its context in a statute."* 480 U.S. 531, 549 n.15 (emphasis added).

In ANILCA, Congress expressly defined "public lands," so the Court need not examine the history of federal law in Alaska to determine its meaning; the Court should consider Congress' given definition. To the extent that the definition is ambiguous, the Court cannot infer that Congress must have meant to include navigable waters because Congress has not demonstrated a "clear and manifest" intent to pre-empt state fisheries management in all state waters. *See supra* at 3.

CONCLUSION

For the reasons stated above, the Court should deny the cross-petition for Writ of Certiorari.

DATED this 12th day of April, 1996.

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Nos. 95-1084 and 95-1496

In the Supreme Court of the United States

OCTOBER TERM, 1995

STATE OF ALASKA, PETITIONER

v.

BRUCE BABBITT, SECRETARY OF THE INTERIOR, ET AL.

ALASKA FEDERATION OF NATIVES, CROSS-PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly concluded, on interlocutory appeal, that the subsistence fishing provisions of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. 3101 *et seq.*, which give a priority to subsistence fishing on "public lands," apply to fishing on some, but not all, navigable waters in Alaska.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1084

STATE OF ALASKA, PETITIONER

v.

BRUCE BABBITT, SECRETARY OF THE INTERIOR, ET AL.

No. 95-1496

ALASKA FEDERATION OF NATIVES, CROSS-PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. 1-24) is reported at 72 F.3d 698. The opinion

of the district court (Pet. Supp. App. 1-50) is unreported.[1]

JURISDICTION

The initial opinion of the court of appeals was filed on April 20, 1995, and a petition for rehearing was denied on August 8, 1995 (Pet. App. 55). Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including December 6, 1995 (Pet. App. 56), and the State of Alaska filed a petition on that date (No. 95-892). On December 19, 1995, the court of appeals withdrew and replaced its opinion. The State accordingly withdrew its petition in No. 95-892 and, on January 5, 1996, filed a new petition for a writ of certiorari under the current docket number. The private petitioner filed a cross-petition on March 18, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

STATEMENT

Private respondents Katie John and other Native Alaskan entities sued the United States in the United States District Court for the District of Alaska under the Alaska National Interest Lands Conservation Act (ANILCA or the Act), 16 U.S.C. 3101 *et seq.* They sought to establish their right to engage in subsistence fishing at Batzulnetas, a traditional Native Alaskan fishing camp within the boundaries of the Wrangell-St. Elias National Park and Preserve. See Pet. Supp. App. 1-2, 22-27. The private respondents later named the State of Alaska as a defendant in that action. See *id.* at 26-27. The

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[1] The citations to "Pet. App." and "Pet. Supp. App." respectively refer to the appendix and supplemental appendix filed in No. 95-1084.

district court granted partial summary judgment to the private respondents on certain legal issues. See *id.* at 43-44. The district court certified that decision for interlocutory appeal under 28 U.S.C. 1292(b), and the court of appeals reversed the district court's decision, but on narrower grounds than the State had urged. See Pet. App. 1-24.

1. Congress enacted ANILCA to preserve "certain lands and waters in the State of Alaska that contain nationally significant natural, scenic, historic, archeological, geological, scientific, wilderness, cultural, recreational, and wildlife values." 16 U.S.C. 3101(a). Congress recognized that public lands in Alaska have special value in supporting "subsistence uses," which Congress defined to include "the customary and traditional uses by rural Alaska residents of wild, renewable resources for direct personal or family consumption." 16 U.S.C. 3113. Congress declared a federal policy "to cause the least adverse impact possible on rural residents who depend upon subsistence uses of the resources of [public] lands." 16 U.S.C. 3112(1).

ANILCA contains specific provisions to preserve "the opportunity for rural residents [of Alaska] engaged in a subsistence way of life to continue to do so." 16 U.S.C. 3101(c). Title VIII of ANILCA establishes a priority for "the taking on public lands of fish and wildlife for nonwasteful subsistence uses * * * over the taking on such lands of fish and wildlife for other purposes." 16 U.S.C. 3114. The Act defines "public lands" to mean (with certain exceptions) lands situated within Alaska that are "federal lands." 16 U.S.C. 3102(3). It defines "federal land" to mean "lands the title to which is in the United States," 16

U.S.C. 3102(2), and it defines "land" to mean "lands, waters, and interests therein," 16 U.S.C. 3102(1).

Title VIII of ANILCA authorizes the Secretaries of the Interior and Agriculture to "prescribe such regulations as are necessary and appropriate to carry out [their] responsibilities" under the Act. 16 U.S.C. 3124; see 16 U.S.C. 3102(12). Title VIII also directs the Secretaries to establish regional advisory councils to review and evaluate proposals for the subsistence use of fish and wildlife. 16 U.S.C. 3115(a). The Secretaries must consider the reports and recommendations of the regional advisory councils when exercising their "administrative authority over the public lands," 16 U.S.C. 3115(c), but they need not follow the recommendation of a regional council if they determine that the recommendation violates recognized principles of fish and wildlife conservation or "would be detrimental to the satisfaction of subsistence needs." *Ibid.*

In recognition of the State of Alaska's traditional responsibility for regulation of fish and wildlife in Alaska, Title VIII of ANILCA permits the establishment of an alternative state regulatory structure to protect subsistence use of public lands by rural Alaska residents. The Act provides that, if within one year of ANILCA's enactment, the State "enacts and implements laws of general applicability which are consistent with, and which provide for the definition, preference, and participation specified in" ANILCA for rural residents, then the Secretary shall not implement the provisions of ANILCA directing the establishment of regional advisory councils. 16 U.S.C. 3115(d). Instead, the state laws, "unless and until repealed, shall supersede such sections [of

ANILCA] * * * for the taking of fish and wildlife on the public lands for subsistence uses." *Ibid.*

2. When ANILCA was enacted, both the State of Alaska and the federal government anticipated that the preference for subsistence uses of wild, renewable resources on public lands by rural residents would be administered by the State of Alaska pursuant to a state regulatory scheme. At the time, Alaska had already adopted a statute conforming generally to ANILCA's requirements for management of subsistence uses of fish and wildlife. See *Bobby* v. *Alaska*, 718 F. Supp. 764, 788-791 (D. Alaska 1989). That statute provided a priority for nonwasteful subsistence use of wild, renewable resources, but it did not limit the priority to "rural Alaska residents," as required by 16 U.S.C. 3113. The State therefore promulgated regulations recognizing that limitation. See *Bobby*, 718 F. Supp. at 767. On May 14, 1982, after the federal government's review and approval of the state regulatory scheme, the State became responsible for all regulation of subsistence use of wild, renewable resources under ANILCA. *Ibid.*

In 1985, the Alaska Supreme Court concluded that the State's regulations limiting the subsistence priority to rural Alaska residents were inconsistent with state statutory law. *Madison* v. *Alaska Dep't of Fish & Game*, 696 P.2d 168 (Alaska 1985). Without that eligibility limitation, the State's subsistence priority ceased to comply with ANILCA, and the Secretary of the Interior withdrew certification of the State's regulatory scheme, pending enactment of state subsistence legislation consistent with ANILCA. See *Bobby*, 718 F. Supp. at 768. The Alaska Legislature then amended the State's subsistence laws to remedy the inconsistency with ANILCA. See

ibid.; *Kenaitze Indian Tribe* v. *Alaska*, 860 F.2d 312, 314 (9th Cir. 1988), cert. denied, 491 U.S. 905 (1989).

In 1989, the Alaska Supreme Court concluded that the amended state subsistence statute violated Alaska's Constitution. See *McDowell* v. *Alaska*, 785 P.2d 1 (1989). The Alaska Supreme Court held that the state constitution prohibits the State from according a preference for the use of renewable resources on the basis of residency and that, because ANILCA expressly reserves the priority for "rural Alaska residents," the State could not conform its legislation to ANILCA without violating the constitutional ban. *Id.* at 6-9. As a result, the United States became obligated to implement ANILCA's subsistence requirements. See 16 U.S.C. 3115.

On June 29, 1990, the Department of the Interior and the Department of Agriculture jointly published temporary subsistence management regulations. See 55 Fed. Reg. 27,114. Among other things, the regulations provided that the priority for subsistence use on "public lands" does not apply to navigable waters. The Departments noted that "[t]he United States generally does not hold title to navigable waters and thus navigable waters generally are not included within the definition of public lands." *Id.* at 27,115; see *id.* at 27,118. The final regulations, which made no relevant change in the interpretation of the scope of federal authority, provided that the priority for subsistence use was limited to "all public lands including all non-navigable waters located on these lands." 50 C.F.R. 100.3(b). See 57 Fed. Reg. 22,940, 22,942 (1992).

3. On December 5, 1990, the private respondents in this case filed suit against the United States in federal district court challenging the exclusion of nav-

igable waters from the federal subsistence regulations. *Katie John* v. *United States*, No. A90-484-CV (HRH) (D. Alaska). The private respondents conducted traditional subsistence fishing at Batzulnetas, which is located within Wrangell-St. Elias National Park and Preserve in south-central Alaska. The fishing camp is located near the confluence of Tanada Creek and Copper River, which have been assumed to be navigable waterways for purposes of this litigation based on a determination by the National Park Service.[2] The plaintiffs sought to extend the priority for rural Alaska subsistence users to fishing at that location. The plaintiffs later joined the State of Alaska as a defendant on the ground that the State claimed general authority, apart from ANILCA, to regulate fishing at Batzulnetas. See Pet. Supp. App. 23-27; E.R. CR8 (private respondents' first amended complaint).[3]

At the time that the private respondents' suit against the United States was pending, Alaska brought a suit against federal officials that challenged the federal government's authority to implement the subsistence management program set out in the temporary federal regulations. *Alaska* v. *Lujan*, No. 92-264-CV (HRH) (D. Alaska). See E.R. CR1 (State's complaint for declaratory and injunctive relief). The district court consolidated Alaska's suit

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[2] Neither the Bureau of Land Management nor the courts have made formal navigability determinations with respect to those rivers.

[3] In 1985, before the Alaska Supreme Court's decision in *McDowell*, the private respondents had commenced litigation against the State of Alaska concerning the State's program for regulating subsistence fishing. The lawsuit at issue here is an outgrowth of that original litigation. See Pet. Supp. App. A24.

with the private respondents' suit, and it has managed those cases jointly with other pending litigation involving subsistence fishing issues. See Pet. App. 1-2.

After consulting with counsel, the district court determined that it should first decide two fundamental issues of law: "who is entitled to manage fish and game within Alaska for purposes of ANILCA, and where does ANILCA apply?" Pet. Supp. App. 2. The parties filed motions for partial summary judgment respecting those questions. In response, the district court ruled on the first issue that "the Secretary, not the State of Alaska, is entitled to manage fish and wildlife on public lands in Alaska for purposes of Title VIII of ANILCA," and it consequently denied the State's motion for partial summary judgment on that issue and dismissed that count of the complaint. *Id.* at 43. On the second issue, it ruled that, "[f]or purposes of Title VIII, 'public lands' includes all navigable waterways in Alaska," and it consequently granted the private respondents' motion for partial summary judgment. *Ibid.*[4]

4. The district court certified its order for interlocutory review under 28 U.S.C. 1292(b). The court of

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[4] At the outset of the litigation, the United States had defended the provisions of the federal regulations that excluded all navigable waters from the federal subsistence management program. At the time of the motions for partial summary judgment, the United States had concluded that the interpretation was not correct. It urged instead that at least some navigable waters—those that are subject to federal reserved rights—are subject to federal subsistence management. See Pet. App. 6. The district court did not reject that theory, but concluded that navigability by itself provided a better basis for determining the geographic scope of ANILCA in this case. See Pet. Supp. App. 33-34.

appeals granted leave for the State of Alaska and the United States to appeal, and a unanimous panel reversed the district court's rulings with respect to the geographic scope of ANILCA. *Alaska* v. *Babbitt*, 54 F.3d 549 (9th Cir. 1995). Based on its review of ANILCA's language and legislative history, the court of appeals had "no doubt that Congress intended that public lands include at least some navigable waters." *Id.* at 552 (footnote omitted). The court accordingly rejected the State's contention that all navigable waters in Alaska are exempt from regulation for subsistence use under ANILCA. But unlike the district court, it was unwilling to accept the private respondents' contention that ANILCA's subsistence priorities extended to all of Alaska's navigable waters. Instead, the court of appeals agreed with the United States' position, first taken in the district court (see note 4, *supra*), that ANILCA extends to "some navigable waters" and that the reserved water rights doctrine provides an appropriate basis for determining what waters are subject to federal subsistence management. 54 F.3d at 553-554.[5]

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[5] Alaska had also asked the court of appeals to review the district court's ruling that the United States, rather than Alaska, had authority to manage subsistence uses. Alaska ultimately dismissed its appeal on that issue with prejudice. The Alaska Legislature and a private organization attempted to intervene for the purpose of continuing the appeal, but the court of appeals rejected those motions. See 54 F.3d at 550 n.2. This Court denied petitions for a writ of certiorari arising from those attempts to intervene. See *Alaska State Legislature* v. *Alaska*, cert. denied, 116 S. Ct. 68 (1995) (No. 94-1976); *Alaska Fish & Wildlife Fed'n* v. *Alaska*, cert. denied, 116 U.S. 272 (1995) (No. 94-1329).

On December 6, 1995, the State of Alaska filed a petition for a writ of certiorari requesting review of the court of appeals' decision respecting the geographic scope of ANILCA. *Alaska* v. *Babbitt*, No. 95-892. On December 19, 1995, the court of appeals withdrew its original unanimous decision and reissued it as a majority opinion, accompanied by a dissenting opinion of Judge Hall. Alaska then withdrew its petition in No. 95-892 and substituted the current petition, which reflects Judge Hall's change of view. See Pet. App. 1-14 (majority opinion); *id.* at 15-24 (Hall, J., dissenting).

ARGUMENT

The court of appeals properly concluded that ANILCA's provision of a priority for subsistence fishing applies to some, but not all, navigable waters within Alaska. That decision, which was issued on interlocutory appeal, does not warrant this Court's review. The decision does not have any significance outside of Alaska, and it involves an issue that is the current subject of a new federal rulemaking proceeding. Contrary to Alaska's urgings, the court of appeals' decision does not conflict with the Alaska Supreme Court's decision in *Totemoff* v. *Alaska*, 905 P.2d 954 (1995). Moreover, as the court of appeals recognized, the questions of whether, and to what extent, the United States or Alaska is responsible for regulating subsistence fishing in navigable waters is intertwined with policy issues that should be addressed in the first instance through the administrative and political fora.

1. ANILCA expressly provides that "the taking on public lands of fish and wildlife for nonwasteful subsistence uses shall be accorded priority over the

taking on such lands of fish and wildlife for other purposes." 16 U.S.C. 3114. The specific question in this case is whether that priority applies to a taking of fish from a fish camp at Batzulnetas, which is located at the confluence of Tanada Creek and Copper River within the boundaries of the Wrangell-St. Elias National Park and Preserve. The private respondents sought to establish their right to a subsistence priority at that location in the face of federal regulations that dictated a contrary result. Those regulations would have precluded a subsistence priority at that location on the theory that the fish are taken from navigable waters and that such waters are categorically excluded from "public lands" within the meaning of ANILCA. See 57 Fed. Reg. 22,942 (1992).

Alaska argues, in accordance with those regulations, that ANILCA's subsistence priority can never apply to navigable waters. See 95-1084 Pet. 15-21. However, the United States determined in the course of responding to the private respondents' motion for summary judgment that the theory put forward in the regulations cannot be reconciled with the text of ANILCA itself. Both the district court and the court of appeals agreed that the regulations' categorical exclusion of all navigable waters is untenable. As the court of appeals explained:

> ANILCA's language and legislative history indicate clearly that Congress spoke to the precise question of whether *some* navigable waters may be public lands. They clearly indicate that subsistence uses include subsistence fishing. *See e.g.*, 16 U.S.C. § 3113. And subsistence fishing has traditionally taken place in navigable waters. Thus, we have no doubt that Congress

> intended that public lands include at least some navigable waters.

Pet. App. 8. The dissenting judge concurred in that conclusion. See *id.* at 18 ("I agree with the majority that Congress, in order to achieve its stated purpose, must have intended *some* navigable waters to fall under ANILCA.") (Hall, J., dissenting).

Although the district court and the court of appeals agreed that the federal regulations were inconsistent with ANILCA, they disagreed on the appropriate principle for determining which navigable waters are subject to ANILCA's subsistence priority. The private petitioner advances the view set out in the district court's decision, which held that the subsistence priority should apply to *all* navigable waters in Alaska. 95-1496 Pet. 7-16; see Pet. Supp. App. 34-43. The court of appeals concluded, however, that the subsistence priority should apply to only those navigable waters that are subject to federal reserved water rights. See Pet. App. 12-13. Under the court of appeals' rationale, the ANILCA subsistence priority would generally be applicable to fishing activities within the boundaries of federal reservations that were set aside with the explicit or implicit understanding that the use of the waters was needed to accomplish the purposes of the reservation. See *id.* at 11 (citing *Cappaert* v. *United States*, 426 U.S. 128, 138 (1976)). But the court left it to the relevant federal agencies to determine precisely "which navigable waters are public lands subject to federal subsistence management." Pet. App. 13.

The fishing location at issue in this case, for example, is within the Wrangell-St. Elias National Park and Preserve, which was established for the

purpose, *inter alia*, "to protect habitat for, and populations of, fish and wildlife," and specifically provides that "[s]ubsistence uses by local residents shall be permitted in the park, where such uses are traditional, in accordance with [Title VIII of ANILCA]." 16 U.S.C. 410hh(9). Relying on that statutory text, the district court concluded that, "[a]pplying the *Cappaert* analysis, it is clear that an unquantified amount of water appurtenant to the park was reserved for the purpose of providing rural Alaskans with the opportunity to pursue their subsistence rights under Title VIII." Pet. Supp. App. 33. The court of appeals, however, has not yet addressed the question whether the subsistence priority applies to the location at issue in this case.

2. There is no warrant for this Court to review that interlocutory ruling at the request of Alaska or the private petitioner. This Court has long followed the practice of declining to "issue a writ of *certiorari* to review a decree of the Circuit Court of Appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Constr. Co.* v. *Jacksonville, Tampa & Key West Ry.*, 148 U.S. 372, 384 (1893). See, *e.g.*, *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostock R.R.*, 389 U.S. 327, 328 (1967); *Virginia Military Institute* v. *United States*, 113 S. Ct. 2431 (1993) (Scalia, J., concurring in the denial of certiorari). This case does not present any "extraordinary" circumstances mandating immediate review, and the lack of finality "of itself alone" accordingly provides a sufficient basis for denial of the petition for a writ of certiorari. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). See

generally Robert L. Stern, *et al.*, *Supreme Court Practice* 195-199 (7th ed. 1993).

a. The court of appeals' decision in this case does not finally resolve the geographic scope of ANILCA's provisions granting a priority to subsistence fishing. The court's interlocutory decision has not definitively resolved any legal rights, including the private respondents' subsistence rights at the particular location at issue in this case. The district court specifically certified for interlocutory appeal under 28 U.S.C. 1292(b) its ruling that ANILCA's subsistence priority applies to *all* navigable waters. By doing so, it necessarily reserved decision on unresolved claims and defenses and preserved its right to reconsider any past rulings (including the existence of reserved water rights in the Wrangell-St. Elias National Park and Preserve) before entry of a final judgment. The district court's final resolution of all matters in the litigation (and the court of appeals' later review of those matters) could substantially affect the need for this Court to address the issue presented here. In keeping with the public interest in the Court's orderly management of its docket, it should not resolve whether to grant review in this case until all issues in the case have been decided. See *Virginia Military Institute*, 113 S. Ct. at 2431 (Scalia, J., concurring in denial of certiorari); cf. William J. Brennan, Jr., *Some Thoughts on the Supreme Court's Workload*, 66 Judicature 230, 231-232 (1983).

b. This case does not present any "extraordinary" circumstances dictating a need for immediate review. Contrary to the arguments of Alaska and its amici, this case does not present any issue of importance outside of the State of Alaska. The court of appeals expressly stated that its interpretation would

not affect "navigable waters elsewhere" because "ANILCA applies only to Alaska." Pet. App. 8 n.9. And even within Alaska, the consequences of the decision are uncertain. Under the court of appeals' interlocutory ruling, the resolution of specific disputes concerning whether the subsistence fishing priority applies to specific activities within federal reservations will depend on either a determination by the relevant federal agencies of "which navigable waters are public lands subject to subsistence management" (*id.* at 13) or additional litigation. The Department of the Interior recently issued an advance notice of proposed rulemaking, including preliminary regulatory text, for public comment. See 61 Fed. Reg. 15,014 (Apr. 4, 1996). Alaska, the private cross-petitioner, and the private respondents are expected to participate in the formulation of the final regulations, which are likely to have a direct bearing on the precise contours and practical importance of the issues involved in this case. And those regulations will, of course, be subject to judicial review.[6]

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[6] Alaska is incorrect in asserting (95-1084 Pet. 9-13) that this case presents a conflict between federal and state regulations. Alaska's petition is replete with speculation regarding "potential" and "likely" scenarios, but there is no sound basis to believe at this point that the final federal regulations will be incompatible with the State's regulatory programs. Indeed, past experience indicates that federal and state authorities are able to manage wildlife cooperatively. For example, Alaska notes (*id.* at 11 n.4) that the State's hunting regulations differ from hunting regulations that the federal government has applied to public lands. But the State has failed to establish that those differences have resulted in any significant conflict in the actual administration of hunting regulations on public lands.

c. Far from presenting "extraordinary" circumstances justifying interlocutory review, the court of appeals' decision does not even satisfy the Court's normal certiorari criteria. The court of appeals' decision does not conflict with any decision of this Court or another court of appeals. And contrary to Alaska's contentions (95-1084 Pet. 8-13), it does not conflict with the Alaska Supreme Court's interlocutory decision in *Totemoff* v. *Alaska*, 905 P.2d 954 (1995) (*reproduced at* Pet. App. 25-54), petition for certiorari pending, No. 95-1512 (filed Mar. 19, 1996). Alaska's assertion of a "jurisdictional crisis" (95-1084 Pet. 8) is unfounded.

In *Totemoff*, the State of Alaska prosecuted a rural hunter for locating and shooting a deer at night through the use of a spotlight. The hunter shined his spotlight and fired his gun from a boat in Prince William Sound while the deer stood on a federally owned island. 905 P.2d at 957. The defendant contended that he was engaged in "customary and traditional" subsistence hunting practices and that ANILCA therefore preempted a state regulation prohibiting hunting with a spotlight. The state supreme court rejected that claim, explaining that Alaska retains its authority to enforce its hunting regulations on federal lands except to the extent that there is an actual conflict between federal and state regulation. *Id.* at 958-960. It concluded that there was no conflict between ANILCA's federal subsistence program and the State's anti-spotlighting regulation. See *id.* at 960-961.

The state supreme court's conclusion that ANILCA did not preempt the state regulation resolved the defendant's preemption claim. The court nevertheless additionally opined that even if ANILCA

generally preempted the State's anti-spotlighting regulation, it would not do so in this case because the defendant engaged in spotlighting while on a boat in navigable marine waters and was therefore outside of ANILCA's geographic reach. 905 P.2d at 961-968. In discussing that matter, the state supreme court took issue with the court of appeals' decision in this case. See *id.* at 962-968. That extended discussion, however, was entirely unnecessary in light of the court's preemption ruling.[7] The state supreme court's obiter dicta provides no basis for Alaska to assert a conflict between the court of appeals and the state supreme court. See *Metropolitan Stevedore Co.* v. *Rambo*, 115 S. Ct. 2144, 2149 (1995) ("Breath spent repeating dicta does not infuse it with life."); *Black* v. *Cutter Laboratories*, 351 U.S. 292, 297 (1956) ("This Court * * * reviews judgments, not statements in opinions.").[8]

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[7] The state supreme court implicitly acknowledged that its discussion was dicta, stating:

> We *hold* that ANILCA does not protect the use of a spotlight as a customary and traditional method of subsistence hunting, and thus there is no actual conflict between ANILCA and Alaska law. * * * * * *Even if* ANILCA does protect customary and traditional means and methods, thereby preempting state enforcement of the anti-spotlighting regulation against Totemoff on federal land, the State still has criminal jurisdiction if ANILCA does not apply to the navigable waters from which Totemoff shined his spotlight at the deer.

905 P.2d at 961 (emphasis added).

[8] Even if the discussion in *Totemoff* were holding rather than dictum, the case would not present an occasion for this Court's review. The Alaska Supreme Court reversed and remanded the defendant's conviction on independent state grounds, directing the lower court to allow "for development

d. Not only are there no sound reasons to grant certiorari, but there are compelling prudential considerations that weigh against review. Alaska contends that the question whether the federal government or the State should be responsible for regulating subsistence fishing in navigable waters presents a policy issue of considerable importance to the State. See 95-1084 Pet. 3. But that contention simply underscores that this Court should expect the parties to afford the pending rulemaking proceeding an opportunity to resolve various issues and, if necessary, to exhaust the political processes before asking the Court to resolve the issue. As the court of appeals explained, the issue presented here—if it is not ultimately resolved in a satisfactory manner through the pending rulemaking process—"cries out for a legislative, not a judicial, solution." Pet. App. 13. Furthermore, the issue here could be resolved through legislative action by *either* Alaska or Congress. As the court of appeals observed:

> If the Alaska Legislature were to amend the state constitution or otherwise comply with ANILCA's rural subsistence priority, the state could resume management of subsistence uses on public lands including navigable waters. * * * If Congress were to amend ANILCA, it could clarify both the definition of public lands and its intent. Only legislative action by Alaska or Congress will truly resolve the problem.

Id. at 13-14. See also *id.* at 23 (Hall, J., dissenting).

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of the record relevant to Totemoff's procedural challenge to the spotlighting ban." 905 P.2d at 973. Hence, the *Totemoff* decision is itself interlocutory.

It is unclear, of course, whether Alaska or Congress will take the actions suggested by the court of appeals. But in light of the interlocutory nature of the court of appeals' decision, the pendency of a federal rulemaking, the opportunities for cooperative resource management by federal and state authorities, and the absence of a conflict between the court of appeals and the Alaska Supreme Court, there are compelling grounds to deny review in the hope that the parties will reach an accommodation through the administrative or political processes. If those efforts are unavailing, then the litigation will continue and the parties will have another opportunity to petition this Court for review. At that point, moreover, the issues would be presented to this Court in a more concrete context.

CONCLUSION

The petition and cross-petition for a writ of certiorari should be denied.

Respectfully submitted.

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